THE OWNERS OF THE SHIP M.V. HONG LEONG

v.

THE OWNERS OF THE SHIP M. T. MAN HUA NO. 3 & ANOR.

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ ABDUL KADIR BIN SULAIMAN J.
[ADMIRALTY IN REM NO. KG. 8 OF 1986]
6 OCTOBER 1994

TORT: Collision at sea - Plaintiff's ship and second defendant's barge - Barge under tow of first defendant's tugboat - Duty of Care - Negligence - Whether first defendant liable for negligence - Whether second defendant equally liable - Whether tugboat and barge a single vessel.

On 9 March 1986, at Tanjung Po in the Sea of Sarawak, a collision occured between the plaintiff's ship, M.V. Hong Leong (the ship) and the second defendant's barge, the Bosta Jaya. At the material time the ship was at anchor while the Bosta Jaya was under the tow of the first defendant's tugboat, M.T. Man Hua No.3. (the tugboat). Bosta Jaya was then unmanned and had no engine or power of its own to move.

Evidence was led which showed that during anchorage the ship had two anchor lights and four cargo lights on. According to PW3, the officer on watch on board the ship, when the tugboat was about 500 yards away and approaching the ship, he had horned 8 times but the boat kept coming towards the ship. He then saw the boat avoiding the ship but the barge which it was towing hit the ship twice. The ship as a result suffered extensive damage and repair cost incurred by the plaintiff amounted to RM80,145.12.

The plaintiff claimed from both defendants for special damages aforesaid. Before the Court the main issues that arose were:

(1) Whether the first defendant owed the plaintiff a duty of care to avoid the said collision and if so, whether there was a breach of that duty.

(2) Whether the ship and the barge constituted a single vessel, and hence whether the second defendant, being the owner of the barge, was equally liable for the collision notwithstanding that at the material time the barge was being towed by and under the control of the agents or servants of the first defendant.

Held:

[1] The tugboat, in managing its affairs under the circumstances at the material time, and having the barge Bosta Jaya in its control, clearly owed a duty of care to avoid the collision between its tow and the plaintiff's ship. The first defendant had failed to discharge this duty of care and for that the first defendant is liable to the plaintiff.

[2] The plaintiff has satisfied the Court as to the amount of damages due from the first defendant, being the cost of repair to the ship caused by the collision, amounting to RM80,145.12 as claimed. The first defendant is to pay the plaintiff the said sum with interest and costs.

[3] The second defendant, the owners of the barge, is not liable for this collision. From the facts disclosed it was clear that at the material time the barge was out of the control of the second defendant. The barge was then under the control and management of the servants or agents of the first defendant. That being the case, the first defendant therefore must be the only party responsible for the natural consequences of the tug being wrongly steered resulting in the collision with the plaintiff's ship. The one ship rule did not apply in this case and hence the second defendant, under the circumstances, cannot be made liable for the act of the first defendant or its agents or servants.

[Judgement for the plaintiff only as against the first defendant].

Legislation referred to:
Rules of the High Court 1980, O. 35 r. 1(2), O. 64 r. 5

Other sources referred to:
Collision at Sea - Marsden.
Halsbury, 4th Edn., Vol. 43, p. 170, para 226

For the plaintiff - Frank Tang; M/s. Tang & Partners, Advocates
For the 1st defendant - C.J. Eng; M/s. C.J. Eng Advocates
For the 2nd defendant - Fabian Lim; M/s. Chua, Khaider Lim & Co. Advocates

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:
By an amended statement of claim the plaintiff claims against both defendants for special damages, interest and costs arising out of a collision at sea between his ship and the 2nd defendants's dumb steel barge under the tow of the 1st defendant's ship.

The particulars of damages as pleaded are:

(a)	Cost of repairs	RM 80,145.12 (S$58,245)
(b)	Estimated loss of profits the period M.V. Hong Leong on dry dock for repairs	RM 60,000.00
(c)	Estimated value of general cargoes contaminated	RM 20,000.00
(d)	Survey fees for damage	RM 4,000.00
	Total:	RM164,145.12
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By way of a counterclaim, the 2nd defendant claims against the plaintiff and the 1st defendant for special damages, interest and costs arising out of the said collision and against the 1st defendant for indemnity in the event the plaintiff succeeds in the claim.

However, no more is to be said on the counterclaim of the 2nd defendant as by a Court order dated on 27 August 1988, the said counterclaim was dismissed summarily with costs to the plaintiff to be taxed. What is left to be considered, therefore, is the claim of the plaintiff against both the defendants.

As for the 1st defendant, at the commencement of the hearing, he was represented by Counsel. Subsequently with the leave of the Court the Counsel was discharged and he was informed of the continued hearing. However, he chose not to appear at all. Pursuant to O. 35 r. 1(2) of the Rules of the High Court 1980 the hearing proceeded in his absence.

This action of the plaintiff arose out of a collision on 9 March 1986 at about 5.45 a.m. between the plaintiff's ship, M.V. Hong Leong, while anchor at Tanjung Po in the sea of Sarawak, and the 2nd defendant's steel barge, Bosta Jaya Ex THM-182 which at the material time was being towed by the 1st defendant's ship M.T. Man Hua No. 3. The Bosta Jaya is a dumb barge carrying stones with no one managing it on board. It has no engine and no power of its own to move.

According to PW2, the captain of M.V. Hong Leong, the ship left Port Klang, Selangor for Kuching on 5 March 1986. On 8 March 1986 at about 9.00 p.m. it arrived at a spot, at latitude 1° 45' 36" and longitude 110° 31' 20", which was about 2 nautical miles from Tanjung Po lighthouse in Sarawak and laid anchor there due to poor visibility at night before proceeding to Kuching. He ascertained this position by means of a radar at the time when the ship was anchored. During anchorage, two anchor lights and 4 cargo lights were on in the ship. During the anchorage, a chief officer, PW3 was assigned to carry out watch duty. At the time of the collision he was asleep but was awakened by the chief officer and when he came out he saw a ship and its tow, which subsequently was identified as M.T. Man Hua No. 3 with its tow, the Bosta Jaya attempting to escape from the scene. With the aid of a radio phone he told the ship which was heading towards the direction of Bintulu to stop. When it refused M.V. Hong Leong gave chase for about 1½ hours and directed them to turn back and proceed to Kuching which they did. At Kuching he lodged a report with the Marine Department and the police. After the accident minor repairs were done to M.V. Hong Leong to stop leakage caused by the collision. Major repairs which took about a month were subsequently carried out at Singapore Slipway and Engineering Co. (Pte) Ltd. Singapore.

According to PW3, Hong Leong's chief officer, on the fateful day he was on duty on board the ship at the material time. While alone doing watch duty on board, he saw a barge collided with his ship. Before the collision he saw from about 500 yards away tug boat approaching the ship. He horned 8 times but the boat kept on coming towards the ship. Then he saw the boat avoiding the ship but the barge which it was towing hit the ship twice. He corroborated the evidence of PW2 that after the collision, the boat did not stop and the ship gave chase and subsequently all proceeded to Kuching.

PW5 is a Pegawai Laut with Marine Department, Kuching. In his evidence he testified that when a vessel is at anchor it is required to show at least one anchor light in the fore of the vessel, white in colour and visible for 360°. If the length of the vessel is more than 100 meters it is required to exhibit another light at the stern and visible for 360° as well for at least 2 nautical miles. According to him when one sees an anchor light one must keep out of the way of the anchored vessel. Under the Prevention of Collision at Sea Regulations when someone on deck sense imminent danger he is required to sound at least 5 short rapid blast on his horn or whistle or he can call on his VHF radio channel 16 to call out the approaching vessel or if he has time to get ready with some fenders to reduce the impact of collision or open anchor brake and release anchor chain to reduce the impact.

PW1 was the repair manager of Singapore Slipway and Engineering Co. (Pte) Ltd. Singapore. He confirmed that in 1986 the company did repair M.V. Hong Leong and he produced an invoice, exhibit P2-7 for S$58,245 in regard to the cost of repair of the ship. To the best of his knowledge the amount charged had been paid by the plaintiff to his company.

For the 2nd defendant the Managing Director of Borneo Shipping & Timber Agencies Sdn. Bhd. Bintulu, Sarawak, the owner of the dumb barge, Bosta Jaya gave evidence. According to him in July, 1985 the company chartered the barge to Liang Ann Shipping Sdn. Bhd. Exhibit D1 is the Timber/Barge Boat Charter Contract No. LAS/BSTA/85/1 dated 15 July 1985. According to D1 the barge was chartered for a minimum period of six months commencing from 22 July 1985 to 21 January 1986 and thereafter on a day to day/month basis unless mutual agreement reached otherwise. According to clause 6 of the agreement, the charterers shall be wholly and solely responsible for any damage caused by the said barge to the property of any third party. Clause 19 of the same stipulates that the charterers shall indemnify the owners against all and any liabilities and claims of whatsoever nature and however arising in connection with the vessel claimed against the owners or imposed upon the vessel at any time during the charter period. According to the witness, M.T. Man Hua No. 3, the tug boat that towed the dumb barge at the material time of the collision is owned by Liang Ann Company Sdn. Bhd. According to exhibits D20 and D21, one Mr. Wong Ding Ang and his wife, Tan Suk Hung are directors of both Liang Ann Shipping Sdn. Bhd. and Liang Ann Company Sdn. Bhd. On 9 March 1986 the barge was still on charter to Liang Ann Shipping Sdn. Bhd. on monthly basis as so provided in the charter agreement.

Those were the evidence collected during the trial both for the plaintiff and 2nd defendant. As for the 1st defendant, as mentioned earlier, he was represented by Counsel when the hearing commenced on 28 September 1993 when the evidence of PW1 was completed. The learned Counsel for the 1st defendant had earlier on, on 14 September 1993 filed in an application for withdrawal of solicitor as she was unable to contact the 1st defendant despite several attempts since 1990 for instructions. However, she was prepared to go on with the trial up to the completion of the evidence of PW1 only but not with further evidence due to lack of instruction from the 1st defendant. After the recording of the evidence of PW1, I adjourned the hearing to 3 May 1994. I also made an order for substituted service upon the 1st defendant of the continuation of the hearing of the suit on 3 May 1994 and the hearing of the application for the withdrawal of solicitor on 6 January 1994. On 6 January 1994 the application for the discharge of the Counsel came up for hearing and the 1st defendant was absent though served by way of substituted service. The Court accordingly made a declaration that the solicitor has ceased to be the solicitor acting for the 1st defendant in the suit, pursuant to O. 64 r. 5 of the Rules of the High Court 1980. When the suit came up for continued hearing on 3 May 1994 the 1st defendant was again absent though duly served by way of substituted service. So the continued hearing proceeded as scheduled. By the close of the case for the defendants, no evidence was adduced by or on behalf of the 1st defendant.

At the end of the trial the learned Counsel for the plaintiff abandoned items (b), (c) and (d) of the particulars of damages claimed leaving only item (a) thereof for

estimated costs of repair of RM80,145.12. From the evidence, I am satisfied that the collision occurred on account of negligent act of the 1st defendant's ship in navigating its tow, the Bosta Jaya, a dumb barge. As such I find the 1st defendant liable to the plaintiff. In managing its affairs under the circumstances at the material time having the dumb barge, Bosta Jaya, in its control, M.T. Man Hua No. 3 clearly owed a duty of care to avoid the collision between its tow and the plaintiff's ship. From the evidence, I am satisfied that the 1st defendant had failed to discharge this duty of care and for that the 1st defendant is liable to the plaintiff. As for the owner of the barge, i.e. the 2nd defendant, the learned Counsel for the plaintiff submitted that the 2nd defendant is also liable because of its collision with the plaintiff's ship. According to him in applying the collision regulations, the Court usually treats the tug and her tow as one ship. As such, *prima facie*, the relation between the tow and the tug is said to be that the tug is the servant or in the service of the tow. Various authorities were cited. Having considered the authorities, I am of the view that those authorities are not in point with the present set of facts and circumstances presented to me in this case. In the circumstances, I cannot accept this line of submission. Marsden - Collision at sea and Halsbury (4th Edition) Vol. 43 at page 170 para 226 has this to say:

> The principle of Admiralty law stated in a number of the older cases, that where one ship is in tow of another, the two ships are, for some purposes, by intendment of law, regarded as one, the command or governing power being with the tow and the motive power with the tug, must now be regarded as overruled, and it must now be taken as conclusively established that the question of the identity of the tow with the tug that tows her, is one of fact, not law to be determined upon the particular facts and circumstances of each case.

What is gathered from the facts disclosed in the evidence is that, at the material time the barge was out of the control of its owners. By the charter agreement they have no more control over the barge during the charter period. It is from the evidence that at the material time the barge was under the control and management of the servants or agents of the 1st defendant. The 1st defendant must be responsible for the natural consequences of the tug being wrongly steered resulting in the collision with the plaintiff's ship. The one ship rule will not apply in the present case. Except for the fact that this accident happened in the sea, what if on land, a lorry owner hires a trailer from a third party and have this trailer attached to his lorry. In the course of driving the lorry with its trailer an accident happened owing to the negligent conduct of those concerned with the lorry whereby the trailer hit the lorry of the plaintiff. In those circumstances can it be said that the third party who gives his trailer on hire be made liable as well to the plaintiff? Thus in the present case, under the circumstances the 2nd defendant being the owner of the barge cannot be made liable for the act of the 1st defendant or its agent or servants.

The learned Counsel for the plaintiff questions the admissibility of exhibit D1 which is the charter agreement entered into between Liang Ann Shipping Sdn. Bhd., the charterer and Borneo Shipping & Timber Agencies Sdn. Bhd. Bintulu, Sarawak, wherein DW1 is the Managing Director, as owners of the barge. The objection is because according to the statement of defence of the 2nd defendant, the barge was chartered to the owners of M.T. Man Hua No. 3 (which is Liang Ann Company Sdn. Bhd.). No doubt in law each of the two companies has an identity of its own. But this is well explained by DW1 and supported by exhibits

D20 and D21 and as commonly happened with some local Chinese businessmen that because the two companies are under the control of the same persons they would allow interchangeability in their accounting procedures. By that I mean the transaction of one company is reflected in the accounts of another and vice versa. They do not conform to the strict rule of the distinct identity of individual companies. According to the evidence of DW1, one Mr. Wong Ding Ang, the director of both the companies told him that both the companies were one and the same and for that reason rentals in respect of the barge by Liang Ann Shipping Sdn. Bhd. are paid by Liang Ann Company Sdn. Bhd. Under those circumstances, I would not consider the defect in the defence of the 2nd defendant that the barge was chartered to the owners of M.T. Man Hua No. 3 which is Liang Ann Company Sdn. Bhd. instead of Liang Ann Shipping Sdn. Bhd. as evidenced by the charter agreement, being fatal to the 2nd defendant. In any event the immediate issue before the Court is not one of contract but one on the issue of whether the owner of the barge, as the 2nd defendant, in the circumstances of the evidence before the Courts, is to be liable for its collision with the plaintiff's ship while under the control of the agents or servants of the 1st defendant in towing the said dumb barge while in the course of its business while not under the direction of the owners of the barge or their agents or servants. They have no one on board the barge to manage its affairs. In the circumstances, the defect in the particular pleading of the 2nd defendant cannot be said to be fatal to the issue.

On the submission by the learned Counsel for the plaintiff as to the admissibility of Exhibits D2 to D19 tendered by the 2nd defendant, I would agree with the submission that those exhibits are not admissible as they were not disclosed by the 2nd defendant in the lists of documents and as such the 2nd defendant has run foul of the rules as to discovery. As such I would reject the exhibits. The introduction of those exhibits by the 2nd defendant during the trial would defeat the purpose of discovery which are three fold:

(1) to enable each party to use before the trial or to adduce any evidence at the trial relevant documentary materials to support or to rebut the case made by or against him;

(2) to prevent surprise at or before the trial relating to documentary evidence; and

(3) to reduce the cost of litigation.

In the circumstances of the case, I hold that the 2nd defendant as the owners of the dumb barge, Bosta Jaya is not liable for its collision with the plaintiff's ship on account of the negligent conduct of the servants or agents of the 1st defendant. Hence the action against the 2nd defendant must be dismissed.

Having found the 1st defendant liable to the plaintiff, what is left to be determined is the amount of damages due to the plaintiff. I am satisfied that the plaintiff has satisfied the Court as to the amount of damages due from the 1st defendant being the cost of repair to the ship caused by the collision amounting to RM80,145.12 as claimed. In the circumstances, I order the 1st defendant to pay to the plaintiff the said sum with interest and costs. The action against the 2nd defendant is dismissed with costs.